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IN THE

# Supreme Court of the United States

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Term, 1952. No.

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ANTOINETTE TUREK,

*Petitioner,*

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Antoinette Turek, prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of Pennsylvania, reversing a judgment in her favor in the sum of $15,000 entered in the trial court, Court of Common Pleas No. 6 of Philadelphia County, State of Pennsylvania, and directing that judgment be entered in favor of the respondent, Pennsylvania Railroad Company; said final judgment of the Supreme Court of Pennsylvania was entered January 7, 1952 and a Petition for Reargument was presented and refused as is hereinafter set forth.

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## OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in Volume 369 Pennsylvania State Reports (Pa.) at page 341. The dissenting opinion is at page 346.

The opinion of the trial court, the Court of Common Pleas No. 6 of Philadelphia County, State of Pennsylvania, is not reported. The opinion is set forth in the Record, pp. 126a to 133a.

## JURISDICTION.

The final judgment of the Supreme Court of Pennsylvania, the highest court of the Commonwealth of Pennsylvania, was entered on January 7, 1952. Pursuant to the rules of said court, a timely Petition for Reargument was filed on January 10, 1952 and was refused on February 4, 1952. The jurisdiction of this court is invoked under 28 U. S. C. Section 1257 (3).

The federal question sought to be reviewed is the right of the petitioner, as the user of a free pass in an interstate trip, issued to her by the respondent, Pennsylvania Railroad Company, pursuant to the provisions of the Hepburn Act, to recover for personal injuries. The federal law is controlling to the exclusion of state law—*Kansas City Southern Ry. Co. v. VanZant*, 260 U. S. 459; and the petitioner is entitled to recover if the employees of the carrier were guilty of wilful *or* wanton negligence—*Francis v. Southern Pacific Co.*, 333 U. S. 445; *New York Central Railroad Co. v. Mohney*, 252 U. S. 152.

The respondent, Pennsylvania Railroad Company, in paragraph 1 of New Matter (R. 7a) set forth that the plaintiff was traveling interstate on a gratuitous pass duly issued, upon the application of her husband, Frank S. Turek, deceased, pursuant to an Act of Congress to wit, The Hepburn Act, as amended, 49 U. S. C., sec. 1 (7).

The trial judge charged the jury, pursuant to the applicable federal law, that the burden of proof was on the plaintiff to establish that the defendant acting through its employees was guilty of wanton negligence (R. 111a).

The Supreme Court of Pennsylvania recognized that the federal law governs and the opinion of the Court states:

"Turek's widow, admittedly was an interstate passenger, riding on a gratuitous pass containing a release of liability, when she received her personal injuries and she cannot recover without a showing of wilful or wanton misconduct on defendant's part: Francis v. Southern Pacific Co., 333 U. S. 445" (R. 139).

But the foregoing statement of the Supreme Court of Pennsylvania is erroneous in that the court substitutes the term "wilful or wanton misconduct" for the term "wilful or wanton negligence."

In the Petition for Reargument (R. 144) it was alleged that the Supreme Court of Pennsylvania erred in applying the standard of wanton misconduct as it has evolved in the Pennsylvania cases, in that "wanton misconduct" so construed is actually equivalent to wilful negligence. Hence wanton negligence is virtually eliminated as a basis for recovery, contrary to the federal law and the federal public policy which is controlling.

The petition for reargument was refused.

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## QUESTIONS PRESENTED.

1. May the federal rule, which permits a carrier to be relieved of liability for injuries sustained by the lawful user of a free pass, where such injuries are caused by ordinary negligence, be extended to relieve the carrier of liability for gross negligence.

2. May a state court in applying the federal law, in an action for personal injuries sustained by the lawful user of a free pass in an interstate trip, substitute the term "wanton

misconduct" for the term "wanton negligence" and then construe wanton misconduct as equivalent to wilful or intentional injury.

3. Where a jury has returned a verdict based on wanton negligence, in a case governed by federal law, may a state appellate court set aside the verdict by holding that the act of the engineer of a passenger train in operating the train around a dangerous curve at a tortiously excessive rate of speed might be gross negligence but did not amount to "wanton misconduct" as that term is construed under the state law, because it was not established that the engineer had actual knowledge that the accident was imminent.

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## STATUTE INVOLVED.

The statute involved is the Hepburn Act, as amended, 34 Stat. 584, 49 U. S. C. sec. 1 (7).

The pertinent provisions are printed in Appendix "A."

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## STATEMENT.

The petitioner's husband, Frank S. Turek, was an employee of the respondent, Pennsylvania Railroad Company. He obtained a special round-trip pass between Altoona, Pennsylvania and Detroit, Michigan. The petitioner and her two small children, on the return trip, boarded a passenger train known as "The Red Arrow" at Detroit, Michi-

gan, on February 18, 1947. Her husband, who had not accompanied her to Detroit, met the train at Pittsburgh, Pennsylvania, and joined his family for the trip to Altoona, where they resided. On the Bennington curve, a sharp and dangerous curve in the mountains of Pennsylvania, about eight miles west of Altoona, "The Red Arrow" jumped the tracks against a 3½ inch superelevated rail, crossed over two sets of westbound tracks, overturned to the outside of the curve and plunged down a steep embankment. The petitioner's husband was killed and she sustained serious personal injuries.

In a prior action to recover for the wrongful death of the husband, it was held that since he was on an *intrastate* trip, the law of Pennsylvania was applicable, and that notwithstanding the release in the pass, the plaintiff could recover upon a showing of ordinary negligence. Judgment on a verdict for plaintiff was affirmed by the Supreme Court of Pennsylvania—*Turek Adm'x v. Pennsylvania Railroad Company*, 361 Pa. 512.

This case is an action to recover for the personal injuries sustained by the wife, and since her trip was an *interstate* trip, it is conceded that the federal law governs.

The evidence offered by the petitioner established that Bennington curve curves sharply to the right (R. 10a), the degree of curvature being 8° 30′ (R. 20a). At this point there are four tracks. From the south or inside of the curve track No. 1 is designated as eastward freight; track No. 2 as eastward passenger; track No. 3 as westward freight and track No. 4 as westward passenger (R. 10a). The defendant railroad had imposed a 35 miles an hour speed limit on the approach to the curve and a 30 miles an hour speed limit on the curve itself (R. 12a).

The outside rail of track No. 2 on which "The Red Arrow" was travelling eastward is elevated at the curve 3½ inches above the inside rail to assist trains in making the curve with safety (R. 11a). "The Red Arrow" travelled a

short distance on the curve and then jumped the high rail, crossed over the two westbound tracks, No. 3 and No. 4, overturned and plunged down the embankment to the north or outside of the curve (R. 12a).

From a chart prepared by the railroad company in the course of its investigation, it was shown that the first engine overturned to the left and came to rest down the embankment 405 feet east of the point of derailment (R. 15a). The tender of the first engine came to rest down the embankment, upside down, 432 feet east of the point of derailment. The second engine overturned to the left and came to rest on its left side down the embankment at a point 401 feet east of the point of derailment. The tender of the second engine stopped, upside down, down the embankment, 469 feet east of the point of derailment. The first car stopped on its left side down the embankment 425 feet east of the point of derailment. The second car stopped on its left side across tracks No. 3 and No. 4 at a point 481 feet east of the point of derailment. The third car, the car in which the plaintiff was a passenger, turned completely over and stopped with the front end on top of the first car and the rear end on track No. 4. The fourth car stopped on its left side and *on top* of the tender of the first engine. The remaining cars were carried forward and to the left for a considerable distance with the fifth and sixth cars also plunging down the embankment (R. 16a, 17a, 18a).

The petitioner testified that she had passed over the curve some 18 or 20 times prior to this occasion; that as the train came out of a tunnel about one mile west of the curve it picked up speed instead of slowing down and that the farther it went the faster it went so that cars swayed from side to side, baggage fell from overhead racks and passengers were jostled one against the other. The car she was riding in turned completely over and she was pinned under the seat which came down and crashed against the ceiling (R. 23a, 24a, 25a).

The engineer who operated the first engine, the sole survivor of the two crews (the other engineer and both firemen were killed), testified that he had operated trains over Bennington curve for many years, that he knew the curve was there and that there was a thirty mile speed limit (R. 29a, 30a).

It was established that over an 8° curve having 3 inches of superelevation of outside rail, the overturning speed is 64 miles per hour (R. 103a). There is a speed recording device on the curve but the train only travelled about one-tenth of the distance of the curve which was not enough to permit the speed recorder to operate (R. 54a, 55a).

For the respondent, the engineer testified that he complied with all the rules and that he operated the train within the authorized speed limit. He testified that he heard a bump which might have been a broken spring hanger (R. 33a-36a). On cross-examination he admitted that the train was derailed before he felt the bump (R. 40a). The respondent also introduced records kept pursuant to the block signal system of operation. There was an unexplained disparity between the train dispatcher's records kept at Pittsburgh and the records kept by the block operator (R. 61a, 62a). Speaking of the records, the trial judge in his opinion said:

> "The time records relied upon by the defendant as corroborating the engineer's testimony were at best inconclusive, for they disclosed an admitted and unexplained discrepancy and also an apparent, although denied, alteration" (R. 131a).

The opinion of the Supreme Court of Pennsylvania makes no reference to the records.

An official of the respondent railroad company, J. D. Morris, superintendent of the Pittsburgh division, testified that in his opinion the distance travelled by the engines and cars after the derailment, was consistent with a speed of twenty-two miles an hour (R. 97a). This opinion was

only concerned with the distance travelled. The witness admitted that he had never taken part in an investigation involving so sharp a curve (R. 95a). His opinion ignored the superelevation of the outside rail, the *dispersal* of the engines and cars after the derailment and their overturning.

In spite of the fact that the railroad had the sole and exclusive opportunity to investigate the accident, and did in fact conduct a thorough and exhaustive investigation as was shown by the chart which was offered in evidence (R. 18a), the *respondent offered no affirmative evidence to explain the happening of the accident.*

There was a verdict for the petitioner in the sum of $15,000. The respondent filed a motion for judgment n. o. v. which was refused by the trial court and judgment was entered for the petitioner.

The respondent appealed to the Supreme Court of Pennsylvania which reversed the judgment and ordered final judgment to be entered in favor of the respondent. The opinion of the court states:

> "This evidence, in the absence of an explanation by defendant, would be ample upon which to base a finding of excessive speed amounting to lack of due care (Turek Adm'x v. Pennsylvania R. R. Co., 361 Pa. 512, 64 A. 2d 779)—it might even be sufficient to show gross negligence. However, we are convinced that such testimony is wholly inadequate to warrant a finding of speed so excessive as to amount to wilful or wanton misconduct, i. e. to show that defendant's engineer had *actual knowledge* (emphasis supplied) of plaintiff's peril but nevertheless pursued his tortious speed with utter indifference to the outcome" (R. 140, 141).

Mr. Justice Horace Stern filed a dissenting opinion (R. 142-144, inc.).

## REASONS FOR GRANTING THE WRIT.

1. The decision of the Supreme Court of Pennsylvania is repugnant to and conflicts with the federal law which governs this case.

The Hepburn Act, enacted in 1906, prohibits the issuance of free passes in interstate transportation except to certain specified classes of persons. The Supreme Court of the United States in *Kansas City Southern Ry. v. VanZant*, 260 U. S. 459, 468 held that Congress took over the entire field of free passes to the exclusion of state law and, in effect, enacted the federal rule as expressed in *Northern Pacific Co. v. Adams*, 192 U. S. 440, that a release of liability provided for in a free pass is effective to relieve the carrier of liability for *ordinary negligence*.

This rule was re-affirmed in *Francis v. Southern Pacific Co.*, 333 U. S. 445. It was held that the well-settled rule sustaining waivers of liability for ordinary negligence has become part of the warp and woof of the Hepburn Act.

But the passenger does not lose all his rights by the waiver of liability in the pass. The Court in *Northern Pacific Co. v. Adams*, 192 U. S. 440, stressed the limitation of this rule to ordinary negligence. The opinion at page 452, cites *Philadelphia & Reading Co. v. Derby*, 14 Howard 468, and *Steamboat New World v. King*, 16 Howard 469, as cases where passengers were permitted to recover even though they received free transportation, because the carriers' employees were guilty of gross negligence. It is true that neither of these cases involved a waiver of liability contained in the provisions of a free pass. But it is an almost universal rule, even in jurisdictions which permit a release of liability for ordinary negligence, that a carrier cannot limit its liability by contract for injuries caused by gross negligence—Elliott, *Railroads* (3d ed.), Sec. 2253.

The Supreme Court of Pennsylvania in an earlier case had recognized the true federal rule. The case of *Bowman v. Pennsylvania Railroad Company*, 299 Pa. 558, 566 (1930), involved a passenger who was injured while riding on a free pass in an interstate trip. The Court said:

> "The burden of proof was here on the plaintiff to show at least that the employees of defendant were guilty of wilful, wanton or *gross negligence*." (Emphasis supplied.)

In the case of *Kasanovich, Adm'x v. George*, 348 Pa. 199, 202 (1943), it was decided for the first time in Pennsylvania that contributory negligence is not a defense where the defendant is guilty of *wilful or wanton misconduct*. Because Pennsylvania does not recognize the doctrine of comparative negligence or the "last clear chance" doctrine, the Court in its opinion established an affinity between wanton misconduct and a wilful tort, since in the case of wilful or intentional injury, contributory negligence is not a defense.

The Supreme Court of Pennsylvania reached the conclusion that it did in the instant case by ignoring the federal rule which is properly applicable, and by applying and extending the rule expressed in the *Kasanovich* case.

As the Supreme Court of Pennsylvania construes wanton misconduct in the instant case it cannot be distinguished from a wilful or intentional tort. One who has actual knowledge that his actions will result in harm but proceeds nevertheless, must be held in law to have intended the harm which does result.

It is significant that Mr. Justice Horace Stern, who wrote the opinion in the *Kasanovich* case, wrote a dissenting opinion in this case.

2. The decision of the Supreme Court of Pennsylvania conflicts with the decision of the Supreme Court of the

United States in *New York Central Railroad Co. v. Mohney*, 252 U. S. 152.

A comparison of the facts in the *Mohney* case with the facts in the case at bar shows that there is no valid distinction between the two cases. In the *Mohney* case the engineer disregarded two block signals indicating danger ahead and collided with the rear of another train. In the instant case, the engineer with full knowledge of the existence of the dangerous curve, disregarded the warning represented by the speed limit and overturned his train.

Whereas, in the *Mohney* case the Supreme Court of the United States held that the evidence justified a finding of wanton negligence, the Supreme Court of Pennsylvania in the instant case reached the opposite conclusion.

3. Unless the decision of the Supreme Court of Pennsylvania is reviewed and the rights of users of free passes, issued to employees and their families, is guarded, such rights may be seriously jeopardized in a number of other states and some federal courts which have replaced the concept of "wanton negligence" with "wanton misconduct", construed as equivalent to wilful negligence.

This case transcends in importance the rights of the petitioner or the error of the Supreme Court of Pennsylvania. The term "wanton misconduct" was unknown in the common law. It was introduced in statutes, such as provisions in workmen's compensation statutes providing that the employe is not eligible for benefits if he is guilty of wanton misconduct (*Nickerson's Case*, 218 Mass. 158); or the so-called "guest statutes," which sometimes provide that a guest in an automobile cannot recover from the host unless the latter is guilty of wanton misconduct (*Cope v. Davison*, 30 Cal. 2d 193); and in judicial decisions which hold that contributory negligence is not a defense where the defendant is guilty of wanton misconduct (*Universal Concrete Pipe Co. v. Bassett*, 130 Ohio St. 567, where the difference

between wanton negligence and wanton misconduct is discussed in rather interesting fashion).

The danger presented to the rights of a user of a free pass under the federal law by substitution of the term wanton misconduct for wanton negligence is made clearly evident by the case of *Evens v. Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans*, 134 F. (2d) 275 (C. C. A. 5th), cert. denied 319 U. S. 756. In that case the plaintiff was a user of a free pass in an interstate trip who brought an action against the carrier to recover for personal injuries. A judgment entered on a verdict in her favor based on wanton negligence was affirmed by the majority of the Circuit Court of Appeals. But there was a dissenting opinion which held that the judgment should be reversed because the evidence did not measure up to wanton misconduct, of which it was said:

> "Wanton misconduct is such as puts the actor in the class with the wilful doer of wrong." (Page 277.)

Given this construction of wanton misconduct in pass cases, the federal rule would permit a carrier to be relieved of liability for death or personal injuries sustained by a lawful user of a free pass, unless inflicted wilfully or intentionally.

This harsh and inhuman construction, accepted by the majority opinion in the instant case and the dissenting opinion in the *Evens* case may supplant the true federal rule in any future case involving the rights of a user of a free pass. Thus there is real necessity for a definitive decision by the Supreme Court of the United States, if the rights of lawful users of free passes are not to remain susceptible of being construed virtually out of existence.

4. It is particularly important to guard the rights of passengers who are lawful users of free passes, since the issuance of such passes is strictly governed by Act of Congress

and is confined to persons naturally entitled to the use of such passes.

At the time the federal rule was established in the case of *Northern Pacific Co. v. Adams*, 192 U. S. 440, the issuance of free passes by interstate railroads was frequently abused, which was undoubtedly the reason for the federal rule that persons who accepted such passes should be bound by the waiver of liability, at least as far as ordinary negligence is concerned.

But with the strict regulation of free passes which prevails at the present time, it is clearly in the public interest to confine the limitation of liability to its proper limits and not to extend it by a process of erosion which narrows the passenger's rights to the vanishing point.

6. The injustice to the petitioner by the decision of the Supreme Court of Pennsylvania, which has deprived her of a verdict justly compensating her for serious personal injuries, is aggravated by the fact that in the case of *Pennsylvania Railroad Co. v. Goldie*, 182 F. (2d) 9, (C. C. A. 6th), a plaintiff who was also riding on an employee's pass containing a waiver of liability and who was also a passenger on the Red Arrow and who was also injured in the same accident, was permitted to recover. Speaking of the *Goldie* case, Mr. Justice Horace Stern, in his dissenting opinion said:

> "I can find no basis for distinguishing it either as to the evidence there presented or the applicable law."

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH MATUSOW,
*Counsel for Petitioner.*

## APPENDIX "A".

Provisions of Hepburn Act, as amended, regulating issuance of free passes, 34 Stat. 584, 49 U. S. C., Sec. 1 (7).

*Free transportation for passengers prohibited; exceptions; penalty.* No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live-stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of

providing relief in cases of general epidemic, pestilence, or other calamitous visitation; *And provided further,* That this provision shall not be construed to prohibit the privilege of passes, or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this chapter; *Provided further,* That the term "employees" as used in this paragraph shall include furloughed, pensioned, and super-annuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and exemployees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction shall pay to the United States a penalty of not less than $100 nor more than $2000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in sections 41, 42, and 43 of chapter 2 of this title.